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IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an Indian Tribe may tax a transaction occurring between two non-Indians on fee land within the reservation?

LIST OF PARTIES TO THE PROCEEDING

The following are parties to the proceeding before this Court:

Atkinson Trading Company, Petitioner.

Joe Shirley, Jr., as Member of the Navajo Tax Commission, Respondent.

Victor Joe, as Member of the Navajo Tax Commission, Respondent.

Derrick B. Watchman, as Member of the Navajo Tax Commission, Respondent.

Elroy Drake, as Member of the Navajo Tax Commission, Respondent.

Steven C. Begay, as Executive Director of the Navajo Tax Commission, Respondent.

RULE 29.6 STATEMENT

Petitioner Atkinson Trading Company is a privately owned corporation. It has no parent corporation and no publicly held company owns any stock in the petitioner.

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OPINIONS BELOW

The opinion of the court of appeals in *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000), is reprinted in the Appendix to the Petition at 1a-51a ("Pet. App."). The court of appeals' unpublished order denying Atkinson Trading Company's petition for rehearing and rehearing *en banc* by an equally divided vote is reprinted at Pet. App. 52a. The unreported opinion and order of the United States District Court for the District of New Mexico in *Atkinson Trading Co. v. Gorman*, Civ. No. 97-1261 BB/LFDG (D.N.M. Aug. 21, 1998), are reprinted at Pet. App. 53a-69a. The opinion of the Navajo Supreme Court (Pet. App. 70a-90a) is unreported. The opinion and order of the Navajo Tax Commission (Pet. App. 91a-101a) are unreported.

JURISDICTION

The opinion of the court of appeals was issued on May 2, 2000. In an order dated June 26, 2000, the court of appeals denied Atkinson Trading Company's timely petition for rehearing or rehearing *en banc*. Atkinson Trading Company filed a timely petition for writ of *certiorari* on September 22, 2000. This Court's jurisdiction to decide this case arises under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The Navajo Hotel Occupancy Tax, Title 24, Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993), is reproduced in its entirety in the Appendix to the Petition. *See* Pet. App. 102a-124a.

STATEMENT OF THE CASE

Petitioner Atkinson Trading Company, Inc. ("Atkinson Trading") is a non-Indian corporation operating a hotel on its own fee land within the Navajo Indian Reservation (the

"Reservation").[1] Petitioner challenges the authority of respondents, various officials of the Navajo Nation (the "Tribe"), to tax transactions occurring wholly between non-Indians on that fee land. Specifically, the Navajo Nation seeks to impose a hotel occupancy tax on Atkinson Trading's overnight guests, who are not members of the Tribe. The courts below upheld the tax, despite the fact that the hotel's guests have no commercial relationship with the Tribe.

I. STATEMENT OF FACTS

A. Cameron Trading Post

The Navajo Nation is a federally-recognized Indian tribe with a large reservation spanning parts of Arizona, New Mexico and Utah. Pet. App. 96a. Atkinson Trading is a New Mexico corporation principally owned by Edwin J. Atkinson, a non-Indian. *See* Pet. App. 95a. Atkinson Trading owns and operates Cameron Trading Post (the "Trading Post"), a hotel and tourist business located near Cameron, Arizona, within the exterior boundaries of the Reservation. Pet. App. 96a.

The Trading Post is located in north central Arizona, about 50 miles from the entrance to Grand Canyon National Park. Joint Appendix 22 ("J.A."). It is adjacent to U.S. Highway 89, about a mile from the intersection with Arizona Highway 64, which leads to the park entrance. J.A. 20-21. The Trading Post consists of a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. Pet. App. 56a. Atkinson Trading's "businesses on the property are focused on the tourist market and deal almost exclusively with non-members of the Navajo Nation, who are primarily attracted to

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[1] As used throughout this brief, "fee land" has the same definition previously ascribed to it by this Court: "The term 'non-Indian fee lands' . . . refers to reservation land acquired in fee simple by non-Indian owners." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (citation omitted).

the property because of its proximity to the Grand Canyon." Pet. App. 96a. A significant portion of its hotel business is provided by tour buses that stop overnight either before or after visiting the Grand Canyon. Pet. App. 57a.

Atkinson Trading owns the property underlying the hotel in fee simple. Pet. App. 96a. Atkinson Trading's title to the property is directly traceable to a fee patent issued by the United States. J.A. 20. At the time that the patent was issued, the property was not located within the Navajo Reservation. Nor was the property located within the Reservation when the Trading Post was opened in 1916. *See* J.A. 21. Subsequently, however, the external boundaries of the Reservation were defined in 1934 federal legislation, *see* Act of Congress of June 14, 1934, ch. 521, 48 Stat. 960-62; the Reservation now completely surrounds Atkinson Trading's fee land. *See* Pet. App. 96a. The 1934 legislation also provided: "All valid rights and claims initiated under the public land laws prior to the approval hereof involving any lands within the areas so defined, shall not be affected by this Act." 48 Stat. at 961.

Neither Atkinson Trading nor any of its non-Indian guests have any express agreements with the Tribe. *See* Pet. App. 65a. Atkinson Trading purchases electric, gas and telephone services for the Trading Post from non-Indian businesses. Pet. App. 93a. "[I]t uses water under a permit from the state of Arizona and . . . it has contracted with a non-Navajo company for the disposal of its solid waste." *Id.* At the time of the Navajo Tax Commission hearing, Atkinson Trading's only business with individual tribal members consisted of the employment of Indian workers at the Trading Post, "a small amount of sales to members and a small amount of purchases of arts and crafts." Pet. App. 96a. However, Atkinson Trading has not made any purchases of arts and crafts from tribal members since 1995. *Id.*

The highways used by Atkinson Trading's guests to reach the Trading Post are jointly patrolled by Arizona state police and Navajo tribal police. Pet. App. 57a. Fire protection in the area of the Trading Post is also jointly provided by the fire departments of local Arizona townships, the Bureau of Indian Affairs and the tribal fire department, which is located about 25 miles from the Trading Post. Pet. App. 57a-58a. There has been one small fire at the Trading Post, which was contained by employees of the Trading Post, but which led to subsequent responses by both state and tribal fire departments. *See* Pet. App. 57a-58a; J.A. 49. Emergency medical services in the Cameron area are provided by both the tribal Emergency Medical Services Department and by state emergency services in Flagstaff, Arizona. Pet. App. 57a-58a. When the Tribe provides such emergency medical services to nonmembers, it often receives reimbursement at a rate designed to cover its costs of providing those services. J.A. 127-29; 134-35. There is no evidence in the record that tribal Emergency Medical Services have ever responded to a call at the Trading Post.

B. The Tribal Hotel Occupancy Tax

Prior to the adoption of the tribal tax at issue in this case, the Navajo Nation collected only three taxes: a "Possessory Interest Tax" on property rights under a Navajo Nation lease; a "Business Activity Tax" on large producers of goods and services and certain construction activity within the Navajo Nation; and an "Oil & Gas Severance Tax" on the removal of oil and gas from reservation lands. *See* J.A. 161. There were no taxes (such as income, sales or property taxes) imposed by the tribe on its individual members. J.A. 144.

In the early 1990s, the Navajo Nation sought to expand its revenues from taxation. According to Derrick Watchman, who served as Executive Director of the Navajo Tax Commission at that time, the Commission studied several

types of new taxes, including an income tax, a gasoline tax, a possible expansion of the Business Activities Tax and the current tax at issue—the Hotel Occupancy Tax ("HOT"). J.A. 141-42. Only the HOT was presented by the Navajo Tax Commission ("NTC") to the Navajo Nation Council for legislative consideration because "it was felt that the hotel occupancy tax was one that we could get through and have the council adopt with less controversy . . . ." J.A. 142-43. The HOT was described by Mr. Watchman as "the best" of the taxes under consideration at "lessen[ing] the tax burden on [our] residents, [our] taxpayers, and transfer[ing] that tax to a transient type of consumer." J.A. 143. The tax was designed to "bring in revenue [but] not have such a high impact to Navajo residents." J.A. 145; *see also* J.A. 143 (HOT would have "the least resistance.").

The Navajo Nation Council enacted the Hotel Occupancy Tax on July 30, 1992. *See* 24 Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993) (Pet. App. 102a-124a). Under the express terms of the HOT statute, "[a] tax is imposed on a person who . . . pays for the use or possession or for the right to the use or possession of a room or a space in a hotel costing $2 or more each day." *Id.* § 102 (Pet. App. 103a). The HOT rate was initially set at five percent of the price of the room but was increased to eight percent as of January 1, 1994. *Id.* § 103 (Pet. App. 103a). The Navajo Tax Commission interprets the HOT to apply to "guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land." Pet. App. 98a.

The tribal code "requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so." Pet. App. 98a; *see* 24 Navajo Tribal Code §§ 104, 107, 111-15 (Pet. App. 103a, 104a, 106a-108a). Additionally, any business that fails to

comply with its obligations to collect and pay the HOT "may have its rights to engage in productive activity within all or some of the Navajo Nation suspended . . . ." 24 Navajo Tribal Code § 117 (Pet. App. 109a).

Since its enactment, the Navajo Nation HOT has been applied to room rentals by non-Indian guests at the Trading Post, notwithstanding the fact that those room rentals are subject to similar taxes by the State of Arizona. Atkinson Trading is also required to pay a 5.5% "transient lodging" tax on the gross proceeds from the operation of its lodging facilities within the State. *See* Ariz. Rev. Stat. Ann. §§ 42-5008(A), 42-5010(A)(2), 42-5070 (Supp. 2000).

II. PROCEDURAL HISTORY

In 1993, Atkinson Trading filed a complaint against the Tribe seeking a declaratory judgment that the Tribe lacked the authority to impose the HOT on the hotel's overnight guests. The United States District Court for the District of New Mexico dismissed the complaint without prejudice, concluding that Atkinson Trading was required to exhaust its tribal remedies. *See Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994).

Atkinson Trading then filed an administrative challenge to the HOT before the NTC, contending that its guests were not subject to tribal authority under the general rule of *Montana v. United States*, 450 U.S. 544 (1981), because they were nonmembers on fee land. It argued that *Montana* and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), established a general presumption against the exercise of tribal civil jurisdiction over nonmembers on reservation fee land. It also argued that the HOT did not satisfy either of the two exceptions set forth in *Montana*.

After an administrative hearing, the NTC issued findings of fact and conclusions of law, upholding the tax as applied to non-Indian guests at the hotel. *See* Pet. App. 95a-100a. The

NTC concluded that, under this Court's decision in *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130 (1982), "the Navajo Nation, in exercising its right of territorial management, has the power to assess a tax on non-Indians within its jurisdiction; i.e., within the exterior boundaries of the Navajo Nation." Pet. App. 94a. The NTC rejected Atkinson Trading's argument that *Montana* governs all questions of tribal authority over non-Indian conduct on reservation fee land, concluding that *Montana* "does not serve to limit this general power to tax which was recognized in *Merrion*." Pet. App. 94a. Atkinson Trading appealed that decision to the Navajo Supreme Court, which affirmed the NTC's decision. Pet. App. 70a-90a.

After exhausting its tribal remedies, Atkinson Trading filed a renewed complaint for declaratory relief in federal district court, invoking federal question jurisdiction under 28 U.S.C. § 1331 (1994). On cross motions for summary judgment, the district court affirmed the application of the HOT to petitioner's non-Indian guests. Pet. App. 53a-68a.[2] The court reasoned that "the consensual-relationships test of *Montana* and *Strate* is the proper framework within which to analyze this taxation case." Pet. App. 63a. However, it asserted that the "*Merrion* provision-of-services or benefits-of-a-civilized-society factors . . . are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present . . . ." Pet. App. 64a.

The court therefore crafted an entirely new standard for determining tribal tax authority over nonmembers:

> The Court's review of case law concerning tribal jurisdiction over nonmembers indicates that the extent to which a tribe will be allowed to regulate or affect non-

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[2] The district court's decision was based upon its consideration of the entire record before the Navajo Supreme Court, as certified to it by that court. *See* J.A. 12-13.

> Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.

Pet. App. 64a. The district court acknowledged that "[n]o explicit consensual relationship was created between the Tribe and the guests . . . ." Pet. App. 65a. Nevertheless, it held that, under its balancing test, "where Plaintiff's customers travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there, that is consensual activity." *Id.* The court reasoned that "the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel," including tribal EMS personnel, police officers and fire officials. Pet. App. 66a. On the other side of the balance, the court concluded that the "burdens imposed by the Tribe on the nonmember guests . . . are minimal" because "the HOT involves only the payment of a tax of 8% of the room rate." Pet. App. 67a.

On appeal, a divided panel of the Tenth Circuit affirmed. Pet. App. 1a-51a. Writing for the majority, Judge McKay adopted the rationale of the district court. First, the court rejected petitioner's argument that the nature of the land within the reservation determined the applicable rule. While recognizing that this Court's decisions "did make an issue of the fee status of the land in question," the majority opined that petitioner's "reading of Supreme Court case law derives from an unwarranted reliance on a coincidence of facts and results . . . ." Pet. App. 15a-16a. In its view, "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." Pet. App. 11a. The court held that *Montana* and *Strate* are "more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations." Pet. App. 17a. The majority

opinion therefore expressly adopted the district court's balancing test. Pet. App. 25a-26a.

The majority then applied this balancing test to find an "implied" consensual relationship between petitioner's guests and the Tribe, based upon the guests' acceptance of "the privilege of remaining on the reservation under the protection and accommodation of the services provided by the tribe." Pet. App. 29a. The "consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability" for the HOT. *Id.* The majority also agreed with the district court that the burden imposed by the tax was not disproportionate to the benefits received from the Tribe. Pet. App. 30a-31a. Thus, it upheld the Tribe's power to tax petitioner's guests.

Judge Briscoe dissented. "[I]t is clear," she reasoned, "that the analytical framework outlined in *Montana* . . . and reaffirmed in *Strate* . . . is the proper one to apply." Pet. App. 36a-37a. Judge Briscoe criticized the majority opinion for giving mere lip service to the *Montana* analysis: "Although the majority purports to apply the *Montana* framework, it makes several major missteps in doing so." Pet. App. 37a. First, "the majority mistakenly concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land . . . . A proper reading of *Montana* and *Strate* indicates this distinction is, in fact, significant." *Id.*

Judge Briscoe further criticized the majority's reliance on *Merrion* to establish its balancing test. "In my view, it is improper to modify the *Montana* framework with any language or 'factors' derived from *Merrion*." Pet. App. 41a. She explained the two separate lines of cases:

> *Montana* operates from a presumption that, absent express authority derived from a treaty or statute, a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land . . . . In contrast, *Merrion* operates

> from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers' conduct occurring on tribal land, and thus contains no particular 'test' or 'factors' for deciding tribal jurisdiction.

Pet. App. 41a. The "majority's newly adopted test," Judge Briscoe reasoned, "subverts the question of whether a consensual relationship exists between the nonmembers and the tribe and replaces it with an entirely different inquiry that, in my view, makes it substantially easier for a tribe to establish jurisdiction over a nonmember." Pet. App. 41a-42a.

When properly applied, Judge Briscoe concluded, the *Montana* test invalidates the tax at issue. The first exception to the *Montana* rule, that of "consensual relationships," was not met. With respect to the majority's "implied consent" rationale, Judge Briscoe concluded that "there is no evidence that any of [Atkinson Trading's] non-Indian guests have been provided medical, health protection, or tourism services by the Nation." Pet. App. 47a-48a (footnotes omitted). With respect to *Montana*'s second exception, Judge Briscoe found no "evidence demonstrating that the conduct, or even the mere presence, of [Atkinson Trading's] non-Indian guests represents a threat to, or has a direct effect on, the [Navajo] Nation's political integrity, economic security, or health and welfare." Pet. App. 50a.

Atkinson Trading filed a timely petition for rehearing or rehearing *en banc*. In an order dated June 26, 2000, the original panel denied the petition for rehearing. By a five-to-five vote, the Tenth Circuit denied the petition for rehearing *en banc*. Pet. App. 52a.

SUMMARY OF ARGUMENT

This case raises the question of whether a tribe can tax a transaction occurring wholly between nonmembers on non-Indian fee land. As a result of evolving federal policies, such lands are now commonplace in America's Indian

reservations. However, the nonmembers who own those lands cannot participate in tribal government. In view of the serious issues that arise when governmental authority is extended over those who are excluded from participation, *see, e.g., Duro v. Reina*, 495 U.S. 676, 694 (1990), this Court has developed an integrated set of rules to determine the scope of tribal civil authority over nonmember conduct on fee land within the reservation. *See, e.g., Montana v. United States*, 450 U.S. 544; *Strate v. A-1 Contractors*, 520 U.S. 438. Under those rules, a tribe cannot tax a transaction wholly between nonmembers on fee land.

This Court's decisions establish two broad principles that apply in determining the proper scope of tribal authority over nonmembers. First, by virtue of their status as dependent sovereigns of the United States, Indian tribes generally have been divested of their authority to determine their external relationships. Thus, they generally cannot exercise their sovereign authority over nonmembers of the tribes. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Montana*, 450 U.S. at 564. Second, the scope of a tribe's power over nonmember conduct depends upon the nature of the land on which that conduct takes place. Where nonmember conduct occurs on tribal lands, a tribe has broad civil authority to regulate the conduct. Where, however, it occurs on non-Indian fee land, tribal powers are strictly limited: "[A]bsent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation . . . ." *Strate*, 520 U.S. at 446.

This Court's general presumption against tribal authority over non-Indian conduct on fee land extends to *all* tribal civil authority—whether related to regulation, adjudication, or taxation. *See Strate*, 520 U.S. at 453 ("While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of 'inherent sovereignty.'"). However,

the general rule is tempered by two narrowly drawn exceptions—the first permitting the exercise of tribal authority where a nonmember has entered into a consensual relationship with the tribe or its members; and the second designed to protect threats to tribal self-government arising from the non-Indian conduct sought to be regulated. *See Montana*, 450 U.S. at 565-66; *Strate*, 520 U.S. at 446.

The Tenth Circuit majority, however, fashioned a different rule through mistaken reliance upon two prior decisions of this Court—*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Neither case involved nonmember conduct on fee land; rather, both involved tribal taxation of nonmember conduct on tribal trust lands. Thus, both decisions fall outside the ambit of *Montana*'s general rule. Moreover, both cases involved transactions by the nonmembers *with the tribe itself*. Thus, even if viewed through the prism of *Montana*, both decisions can be understood as applications of *Montana*'s first exception for consensual relationships by nonmembers with the tribe. *See Montana*, 450 U.S. at 565-66 (citing *Colville* as an illustration of *Montana*'s first exception).

The Tenth Circuit also drew support for its contrived "balancing" test from two other inapposite sources. First, it relied upon the definition of "Indian country" in 18 U.S.C. § 1151 (1994). That statute, however, did not affect the outcome in either *Montana* or *Strate*, even though the nonmember conduct in both cases took place on land falling within the statutory definition of "Indian country." *See Montana*, 450 U.S. at 562; *Strate*, 520 U.S. at 454 n.9. Second, the Tenth Circuit quoted language from a nearly century-old circuit court decision, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), to suggest that a tribe has expansive authority to tax nonmembers. The cited language from *Buster*, however, is inconsistent with modern Indian jurisprudence found in

Montana and its progeny. Moreover, *Buster* arose under unique circumstances involving congressional and presidential authorization of the taxes at issue in that dispute. It is therefore not relevant here.

Properly applied, *Montana* and *Strate* invalidate the application of the Navajo HOT to Atkinson Trading's non-Indian guests. There is no dispute in the record that Atkinson Trading, a non-Indian company, owns the land underlying the Trading Post in fee. Nor is there any plausible argument that Congress has expressly authorized the Navajo Nation to apply its hotel occupancy tax to nonmembers. Thus, if the tax is to survive, it must pass muster under one of the two *Montana* exceptions.

The Navajo HOT is not supported by *Montana*'s first exception for "consensual relationships" between the nonmembers subject to the tax and the Navajo Nation. As the district court properly found, "[n]o explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." Pet. App. 65a. Nor does the Navajo Nation HOT arise from any express consensual relationship between the Navajo Nation and Atkinson Trading.

Those facts alone should have led the lower court to conclude that *Montana*'s consensual relationships exception is not implicated in this case. Nevertheless, it held that a relationship of "implied consent" exists because the Tribe provides, or potentially provides, the "benefits of a civilized society," such as police, fire and emergency services, to the hotel's guests. This "benefits" test finds no support in this Court's *Montana* jurisprudence. Indeed, this Court has repeatedly rejected a theory of "implied consent" arising from the presence of non-Indians within the confines of the reservation. *See, e.g., Duro*, 495 U.S. at 676. In both *Montana* and *Strate*, the nonmembers sought to be regulated

by the tribes could have received potential benefits from the tribes by virtue of their presence on the reservation. In fact, in *Strate*, where the nonmember conduct at issue involved an automobile accident on the reservation, the likelihood of receipt of tribal emergency services by a nonmember was much greater than in this case, where the only nonmember conduct at issue was an overnight stay in a hotel. Nevertheless, this Court there rejected entreaties by the tribal petitioners and the United States to adopt a "benefits" standard for determining consensual relationships.

Nor is *Montana*'s second exception satisfied in this case. That exception is reserved for demonstrably serious threats to tribal self-government arising from nonmember conduct. But the nonmember conduct at issue here—the renting of hotel rooms—can hardly be said to "trench unduly" on the Navajo Nation's ability to govern itself. *Strate*, 520 U.S. at 458. Overnight hotel stays do not have any greater impact on tribal self-government than the non-Indian hunting and fishing at issue in *Montana* or the reckless driving at issue in *Strate*—neither of which was deemed sufficient to implicate *Montana*'s self-government exception. Indeed, it is difficult to see how "self-government" is implicated at all by a tribal tax which falls almost entirely on transient nonmembers.

Thus, under the well-established framework of *Montana* and *Strate*, the Navajo Nation has no authority to tax a nonmember guest's rental of a hotel room at the Cameron Trading Post—a transaction wholly between nonmembers on fee land.

ARGUMENT

I. THE GENERAL RULE OF *MONTANA v. UNITED STATES* GOVERNS TAXATION OF NON-INDIANS ON FEE LAND

As this Court recently and unanimously stated, *Montana v. United States* is "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445.

Montana confirmed two key principles that govern the outcome of this case. First, it recognized "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. Second, it drew a clear demarcation between the sovereign powers of the tribe over nonmembers on tribal lands and nonmembers on fee lands. While tribal powers over nonmembers on tribal trust lands are considerable, *Montana* established a general rule that an Indian tribe lacks authority over nonmembers on non-Indian fee land, subject to two carefully limited exceptions. That general rule applies to the Navajo Nation's attempt to collect its hotel occupancy tax from non-Indians staying on Atkinson Trading's fee land.

A. By Virtue of Their Incorporation into the United States, Indian Tribes Generally Have Been Divested of Authority over Nonmembers

The general rule established in *Montana* that tribes cannot exercise sovereignty with respect to nonmembers on fee lands represents a distillation of more than a century of case law. This Court has long held that, by virtue of their incorporation into the United States, Indian tribes lack the "complete sovereignty" normally exercised by independent nations. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

Chief among the restrictions on tribal power stemming from incorporation was the loss of the tribes' sovereign authority over nonmembers: "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian

tribe and nonmembers of the tribe." *Wheeler*, 435 U.S. at 326. "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*." *Id.* (emphasis added); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring) (incorporation of tribes within the United States limits the tribes' "right of governing every person within their limits except themselves").

This limitation stems, in part, from the closed nature of tribal government. Most tribal governments, like the Navajo Nation, are closed to participation by nonmembers of the tribe.[3] Nonmembers cannot vote in tribal elections.[4] Nor may nonmembers qualify for elected offices in tribal governments.[5] Where a tribe seeks to exercise jurisdiction over its own members, fairness is assured by the members' "right of participation in tribal government, the authority of which rests on consent." *Duro v. Reina*, 495 U.S. at 694. But where a tribe seeks to govern its relationships with nonmembers, this Court has "reject[ed] an extension of tribal authority over those who have not given the consent of the governed that

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[3] The Navajo Nation tribal code limits eligibility for membership in the Tribe to "persons of Navajo blood whose names appear on the official roll of the Navajo Nation" and any person "who is at least one-fourth degree Navajo blood." 1 Navajo Tribal Code § 701. Membership may not be obtained by any other method. *Id.* § 702(A) (no one "can ever become a Navajo, either by adoption, or otherwise, except by birth").

[4] *See* 11 Navajo Tribal Code § 281 (limiting voter eligibility to "[a]ll persons . . . enrolled on the Agency Census roll of the Bureau of Indian Affairs as members of the Navajo Nation" over age 18).

[5] *See, e.g.*, 11 Navajo Tribal Code § 8(A) (defining qualifications for Navajo President and Vice President to include "member[ship] of the Navajo Nation"); *id.* § 8(B) (requiring that each Delegate to the Navajo Nation Council "be an enrolled member of the Navajo Nation on the Agency Census roll of the Bureau of Indian Affairs").

provides a fundamental basis for power within our constitutional system." *Id.* at 694.

The inherent limitations on a tribe's authority to control its external relations have led to well-defined restrictions on tribal governance of nonmembers. In *Oliphant*, this Court held that Indian tribes lack the power to enforce their criminal laws against non-Indians, unless explicitly authorized by Congress. 435 U.S. at 210. Tribal prosecution of non-Indian offenders, the Court concluded, is "'*inconsistent with their status*'" as dependent sovereigns of the United States. *Id.* at 208 (citation omitted).[6]

The same principles led the Court in *Montana v. United States*, 450 U.S. 544, to conclude that an Indian tribe generally lacks the power to exercise its civil authority over non-Indians: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support *the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe*." *Id.* at 565 (footnote omitted) (emphasis added).

At issue in *Montana* was the Crow Tribe's attempt to regulate non-Indian hunting and fishing on its reservation. The tribe argued that it retained the power to regulate non-Indian hunting and fishing "as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation." *Id.* at 563. The Court rejected that general assertion, noting that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty."

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[6] This holding was extended to prohibit a tribe's exercise of criminal jurisdiction over nonmember Indians in *Duro v. Reina*, 495 U.S. at 688 ("In the area of criminal enforcement . . . tribal power does not extend beyond internal relations among members.").

Id. (citing *Wheeler*, 435 U.S. at 326). The Court recognized that the Crow Tribe retained sovereign powers relating to its own governance—such as "the power to punish tribal offenders, . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564. However, it reasoned that tribal sovereignty extends no further than necessary to preserve that self-government: the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.*

This Court recently and unanimously reaffirmed this principle in *Strate v. A-1 Contractors*. The Court there squarely rejected the notion that a tribe could exercise inherent power over all nonmembers within reservation boundaries. "In the main . . . 'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe.'" 520 U.S. at 445-46 (citation omitted). Thus, *Strate* confirms what *Montana* articulated—the general presumption that a tribe lacks civil authority over nonmembers.

B. *Montana* Strictly Limits Tribal Sovereignty over Nonmembers on Fee Lands

In light of *Montana*'s general presumption, a tribe must point to a *specific* source of power whenever it seeks to exercise authority over nonmembers. *Montana* and *Strate* identify the tribe's ownership and control of its land as a primary source of such authority. Those cases therefore sharply limit a tribe's sovereignty over nonmembers on land owned in fee by non-Indians.

In *Montana*, this Court drew a clear distinction between the power of a tribe to regulate nonmember conduct on tribal land and its power to regulate nonmember conduct on land owned

in fee by nonmembers. The Court acknowledged the terms of the treaty at issue gave the Crow Tribe "absolute and undisturbed use and occupation" of its tribal land. The treaty also "gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it . . . ." 450 U.S. at 554. Thus, the Court could "readily agree" with the conclusion of the court of appeals "that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Id.* at 557. Further, the Court agreed that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits." *Id.*

The Court reached a different conclusion, however, with respect to reservation lands owned by nonmembers, concluding that "'inherent sovereignty' is not so broad as to support the application of [the tribal ordinance] to non-Indian lands." 450 U.S. at 563. Regulation of nonmember activity "on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations" and thus is not supported by "retained inherent sovereignty" of the tribe. *Id.* at 564-65. A tribe's authority over nonmembers "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'" *Id.* at 559 (citation omitted).

This general rule was tempered by two exceptions. The first stems from a theory of consent by the nonmember to tribal regulation: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. *Montana*'s second exception seeks to prevent threats to tribal self-government: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the

political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Neither of the exceptions was found to be implicated by hunting and fishing on fee lands no longer owned by the tribe, but owned by non-Indians.

Subsequent cases have confirmed that, where a tribe lacks or surrenders a right to control lands within the reservation boundaries, the rule of *Montana* will apply. For example, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court held that the Yakima tribe lacked the power to zone nonmember land in an area of the reservation in which the tribe no longer had any control over non-Indian access. *Id.* at 424 (opinion of White, J.); *id.* at 444-45 (Stevens, J., concurring in relevant part).[7]

In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Court held that a tribe had no authority to regulate nonmember hunting and fishing on certain reservation lands acquired by the United States for a flood zone. The Court explained: "*Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." 508 U.S. at 689. "The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* (footnote omitted). The Court concluded that, in taking the tribal trust lands under federal law, Congress "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the *incidental regulatory jurisdiction* formerly enjoyed by the Tribe." *Id.* (emphasis added).

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[7] Writing for a separate majority, Justice Stevens upheld the tribe's zoning power with respect to that portion of the reservation where the tribe maintained a strict "'courtesy permit system'" for visitors, which was enforced by officers at four guard stations controlling access. *See* 492 U.S. at 439.

Most recently, in *Strate*, the Court held that *Montana*'s limitation on tribal authority over nonmembers is not confined to non-Indian fee lands, but rather extends to *all* reservation lands over which the tribe "cannot assert a landowner's right to occupy and exclude." 520 U.S. at 456. The Court held that the tribal courts could not exercise jurisdiction over a nonmember defendant for an accident occurring on a state highway running through the reservation. *Id.* at 442. The right-of-way for the highway lay on land held in trust for the tribes and their members. *Id.* at 442-43. Nevertheless, the *Strate* Court held that, because the tribes had lost their "gatekeeping right" over the highway, the federally-granted right-of-way was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at 454 (footnote omitted).

Strate further confirms that *Montana*'s main rule and its two exceptions provide the governing standards for *all* exercises of tribal civil authority over nonmembers. Rejecting an argument that a different rule should apply for purposes of tribal court jurisdiction, *Strate* emphasized not only the "pathmarking" role of *Montana* but also the "general" nature of its rule. 520 U.S. at 446. "Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" *Id.* at 453 (citation omitted).[8]

A tribe's authority to tax nonmembers is part and parcel of the tribal civil authority covered by *Montana*'s rule. In its first exception, *Montana* explains that a "tribe may regulate,

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[8] *See also id.* at 453 ("Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'") (alteration in original) (citation omitted).

through *taxation*" activities arising out of a consensual relationship between a nonmember and the tribe or its members. 450 U.S. at 566. *Montana* cited several cases in which a tax had been upheld based upon consensual relationships with a tribe or its members.[9] By including the power to tax within its exception, *Montana* expressly contemplated that tribal taxation would be subject to its main rule with respect to nonmembers on non-Indian land.

Montana's application of a uniform standard to both tribal regulation and tribal taxation makes eminent sense. In reality, these two powers cannot easily be separated. As Chief Justice Marshall explained, the taxing power is tantamount to the ultimate regulatory power: "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Additionally, a government's power to tax is usually meaningful only where it can be enforced through regulatory mechanisms. For example, in the HOT statute, the Tribe reserves the right to enforce Atkinson Trading's obligations by suspending "its rights to engage in productive activity within all or some of the Navajo Nation . . . ." 24 Navajo Tribal Code § 117. The HOT portion of the Navajo tax code also contains a number of other regulatory provisions, such as a recordkeeping requirement,[10] a lien creation and recording procedure,[11] and a restriction on business transfers without payment of the tax.[12] Thus, the Tribe relies heavily upon its regulatory power to enforce its tax code.

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[9] 450 U.S. at 565-66 (citing *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)).

[10] 24 Navajo Tribal Code § 111 (Pet. App. 106a).

[11] 24 Navajo Tribal Code § 121 (Pet. App. 111a).

[12] 24 Navajo Tribal Code § 126 (Pet. App. 114a).

Accordingly, *Montana* sensibly treats *all* civil authority—regulatory, adjudicatory or fiscal—in a like manner.[13] In the absence of express congressional authorization to the contrary, an Indian tribe can neither regulate nor tax nonmember conduct on fee land unless one of the two *Montana* exceptions applies. *See Strate*, 520 U.S. at 453.

C. The Tenth Circuit Erroneously Relied on Decisions Involving Tribal Trust Lands

Though purporting to apply *Montana*, the court of appeals in this case rejected what it deemed to be "the arbitrary factual basis of fee status as the determinative factor" in the *Montana* analysis. Pet. App. 25a. "Nothing" in this Court's decisions, the panel majority reasoned, "suggested that fee status is a limitation on the power to tax." Pet. App. 16a. In fact, the majority opined that "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." Pet. App. 11a.

The majority based its conclusion on a misreading of two of this Court's decisions—*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130. Neither of those cases is applicable to this dispute. Their facts differ in two important respects from the situation here. First, the taxes applied to nonmember conduct *on tribal lands*, not fee land governed by *Montana*'s general rule. Second, they involved transactions by nonmembers *with the tribe itself*.

The panel majority cited *Colville* for the proposition that "'[f]ederal courts . . . have acknowledged tribal power to tax

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[13] Indeed, the *Montana* Court assumed that the power to impose a licensing fee on hunting and fishing would follow the same rules as other forms of regulation. *See* 450 U.S. at 557.

non-Indians entering the reservation to engage in economic activity.'" Pet. App. 18a (citations omitted) (alterations in original). That acknowledgement, however, extends only as far as the facts of *Colville* itself. There, the Court considered the power of certain Indian tribes to tax cigarette sales by those tribes at tobacco outlets on tribal lands. Two different selling and tax schemes were at issue. Under both, however, the tax was imposed on a direct purchaser of the cigarettes from the tribe.[14] In upholding the tribal taxes, the Court carefully reasoned that the tax was permissible because (1) the sales occurred on tribal trust lands; and (2) the tribes were parties to the transaction. "The power to tax transactions *occurring on trust lands* and *significantly involving a tribe* or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Colville*, 447 U.S. at 152 (emphasis added).[15]

If this language in *Colville* left any doubt about the scope of the holding there, that doubt is resolved by Justice White's later characterization of that decision in his plurality opinion in *Brendale*. Justice White, who had authored the majority opinion in *Colville*, noted that its holding extended only to tribal lands: "As the opinion in *Colville* made clear, that case

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[14] Under the first, the tribes distributed cigarettes to tobacco outlets, which would sell the cigarettes on a consigned basis to the ultimate consumer. The tribes would continue to hold title to the cigarettes until purchased by the consumer, who would pay the tax in connection with the purchase. 447 U.S. at 144. Under the second scheme, the tribe acted as a wholesaler, selling its cigarettes to licensed retailers and collecting its tax directly from those retailers. *Id.* at 144-45.

[15] Even if the sales in *Colville* had taken place on non-Indian land, the fact that the tribes themselves were parties to the transaction might have independently supported the tax under *Montana*'s first exception. *See Montana*, 450 U.S. at 565-66 (citing *Colville* as an illustration of *Montana*'s first exception).

involved '[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members.' It did not involve the regulation of fee lands, as did *Montana*." *Brendale*, 492 U.S. at 427 (White, J.) (citation omitted) (alteration in original). Thus, *Colville* has no applicability to a case such as this, where the transactions do not involve the tribe and do not take place on tribal trust lands.

For the same reasons, the lower court's reliance on *Merrion* is misplaced. In *Merrion*, the entire reservation was tribal trust land. 455 U.S. at 133. The non-Indians subject to the tax had long-term leases *with the tribe* to extract and produce oil and gas from those reservation trust lands. *Id.* This Court upheld a tribal oil and gas severance tax as it applied to activities pursuant to those leases on tribal land. 455 U.S. at 133 ("severance tax on 'any oil and natural gas severed, saved and removed *from Tribal lands*'") (emphasis added) (citation omitted). *Merrion* is therefore little more than a straightforward application of *Colville*—it is another case involving "'transactions occurring on trust lands and significantly involving a tribe or its members . . . .'" *Merrion*, 455 U.S. at 137 (citation omitted).

Merrion contains language often cited by proponents of tribal authority concerning the source of a tribe's power to tax. Specifically, *Merrion* rejected the notion that "the authority to tax derives *solely* from the power to exclude." *Id.* at 141. The majority opinion made this point, however, in response to the dissent's argument that the tribe had lost its power to tax when it granted a lease on tribal land. *See* 455 U.S. at 186 (Stevens, J., dissenting). In essence, the Court held that the tribe's power to tax nonmembers on tribal lands did not dissolve simply because the tribe had previously entered into agreements permitting particular non-Indians to enter those lands. However, the Court did not assert that the power to tax would extend beyond tribal lands or tribal transactions. The opinion nowhere suggests that the rules in

those circumstances would be any different than as stated in *Montana*.

On the contrary, *Merrion* recognizes significant limitations on a tribe's power to tax. "[T]here is a significant territorial component to tribal power." *Id.* at 142. The Court reasoned that "the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction." *Id.* The Court reasoned that a nonmember must take some affirmative step in entering tribal lands or entering into a transaction with the tribe before tribal jurisdiction attaches: "[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Id.*[16] In *Merrion*, of course, the non-Indians had done both and thus were understandably subjected to tribal authority. In this case, by contrast, Atkinson Trading's guests do neither. They do not enter tribal trust lands, but rather, stay at a hotel on fee land located just off a federal highway right-of-way. Nor do they conduct any business with the Tribe or its members. The only transaction at issue here is one wholly involving nonmembers. Thus, the transaction sought to be taxed is fundamentally outside the area which both *Colville* and *Merrion* describe as necessary to preserve tribal sovereignty.

In *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), the Ninth Circuit properly recognized that the reach of *Colville* and *Merrion* was confined to transactions occurring on tribal lands. "While both cases contain broad language regarding tribal taxation powers, neither case abrogates *Montana*'s main rule." *Id.* at 952. *Colville*, the Ninth Circuit reasoned, "directly address[ed]

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[16] These conditions for the assertion of tribal authority over nonmembers parallel *Montana*'s holding that a tribe may regulate non-Indian conduct on tribal trust lands and its first exception for consensual relations with the tribe.

only Indian taxation power over transactions occurring on Indian land. . . ." *Id.* In the same vein, *Merrion* "did not directly address a tribe's power to tax property located on the equivalent of non-Indian fee land." *Id.*

Lacking any basis in this Court's decisions to support tribal taxation of nonmembers on fee land, the Tenth Circuit embarked on its own delineation of the source of tribal powers over nonmembers. It relied heavily on the federal statute defining "Indian country," 18 U.S.C. § 1151. The purpose of that statutory definition, however, was to define the scope of federal criminal jurisdiction.[17] No decision of this Court has ever invoked it to describe the scope of tribal powers over nonmembers on non-Indian fee land. On the contrary, this Court has applied *Montana*'s presumption against tribal authority over nonmembers even in circumstances where it was plain that the land at issue fell within Indian country for purposes of federal criminal jurisdiction. *See Montana*, 450 U.S. at 562; *Strate*, 520 U.S.

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[17] 18 U.S.C. § 1151 explains that the definition of "Indian country" is limited in its application to "this chapter"—Chapter 53 of Title 18, governing federal crimes relating to Indians:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151; *see also Strate*, 520 U.S. at 454 n.9 (describing 18 U.S.C. § 1151 as part of federal criminal law chapter).

at 454 n.9.[18] The definition of "Indian country" does not change the fundamental distinction drawn in these cases between lands over which the tribes exercise dominion and control and those owned or controlled by nonmembers. Even more fundamentally, Section 1151 fails to the meet the requirement of an express congressional authorization of power over nonmembers established by several decisions of this Court. *See Montana*, 450 U.S. at 564 (tribal jurisdiction over nonmembers "cannot survive without express congressional delegation"); *Strate*, 520 U.S. at 445 ("[A]bsent *express* authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.") (emphasis added); *Bourland*, 508 U.S. at 695 n.15.

The Tenth Circuit majority also sought support from the discussion of inherent tribal powers in a much earlier Eighth Circuit decision, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905). *See* Pet. App. 14a-15a. *Buster* has been cited by this Court as one of several cases in which the exercise of tribal authority over nonmembers was permissible based on a consensual relationship with the tribe or its members. However, this Court has never endorsed all of the reasoning of that case, much of which is inconsistent with the holdings of *Montana*, *Strate* and other cases regarding the treatment of nonmembers on land over which the tribes have surrendered control.[19] To

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[18] The tribal petitioners in *Strate* argued that the definition of "Indian country" in 18 U.S.C. § 1151 supported their position that the tribe could exercise sovereignty over nonmember conduct on the right-of-way, but the Court rejected that view. *See* Brief of Petitioners at 22, *Strate v. A-1 Contractors* (No. 95-1872).

[19] *Compare, e.g., Buster*, 135 F. at 950 ("The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.") *with Montana*, 450 U.S. at 564 ("exercise of tribal power beyond what is necessary to protect tribal self-

the extent that the Tenth Circuit panel majority relied on anachronistic conceptions of tribal sovereignty in *Buster*, it "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' and is therefore *not* inherent." *Bourland*, 508 U.S. at 695 n.15 (citation omitted).

Buster is also of limited value to this dispute because it rested on specific congressional and presidential action authorizing tribal license fees. In 1900, the Creek Nation had imposed a licensing fee as a condition to entering the reservation and operating certain types of businesses. Pursuant to statute, Act of Congress of June 28, 1898, ch. 517, 30 Stat. 495, 518, the tribal ordinance was approved by the President and enforced by the Secretary of the Interior in written regulations. 135 F. at 954.[20] "Both parties knew that this power existed, and the United States, by the act of its President approving the law of the Creek national council, and the Secretary of the Interior by enforcing it, had approved its exercise." 135 F. at 954. In 1901, however, the United States entered into a new treaty with the Creeks, which provided that non-Indians could purchase their leased lots

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government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."). *Compare also Buster*, 135 F. at 951 ("[T]he jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it . . . .") *with Strate*, 520 U.S. at 453 ("[T]he civil authority of Indian tribes . . . with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'") (citation omitted).

[20] Earlier decisions had approved such fees based on the notion that the tribe could condition access to its lands upon procurement of the license. *Morris v. Hitchcock*, 194 U.S. 384, 392 (1904); *Maxey v. Wright*, 54 S.W. 807, 810-11 (Indian Territory Ct. App.) ("[T]he Creek Nation is clothed with the power to admit white men, or not, at its option, which, as we hold, gave it the right to impose conditions."), *aff'd*, 105 F. 1003 (8th Cir. 1900).

from the tribe. *Id.* at 951. The 1901 agreement prohibited the tribe from imposing certain fees (*e.g.*, a licensing fee with respect to grazing), but did not address the business license fee. *See id.* at 953-54. The *Buster* court concluded that the 1901 treaty did not deprive the Creek Nation of its previously recognized right to impose the license fees. "As the law then in force required such noncitizens to pay such taxes, as both parties were then aware of the fact and considered the question, and as they made no stipulation to abolish these taxes, the conclusive presumption is that they intended to make no such contract . . . ." *Id.* at 954. Thus, *Buster* implemented what the Court perceived to be the specific intent of the parties to the 1901 treaty. *See Montana*, 450 U.S. at 564 (the exercise of tribal sovereignty over nonmembers may be authorized by congressional action).

In this light, the court of appeals was wrong to modify the general rule fashioned in *Montana* based on the broad language of the court of appeals in *Buster* almost a century ago. *Montana*'s distinction between lands over which a tribe can exercise control and lands surrendered to the control of others has been reaffirmed in *Strate* and consistently applied in determining the limits on tribal authority over the conduct of nonmembers.[21]

Rather than adhere to the rule set forth in *Strate* and *Montana*, the Tenth Circuit here proposed its own multi-factor balancing test. It purported to weigh "(1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its

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[21] *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* on ground that 'the events in question here occurred on tribal lands"); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000); *Big Horn County*, 219 F.3d 944.

interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved." Pet. App. 25a. In the panel majority's view, its "case-by-case approach," *id.* at 17a, "leaves the Supreme Court's Indian law jurisprudence more cohesive and intelligible." *Id.* at 25a. In reality, this approach leaves the courts without any definite guidelines on the scope of tribal power over nonmembers on fee land and invites continuing litigation. This vague balancing test is a tell-tale sign that the lower court has drifted far from the moorings provided by this Court's decisions. The general rule set forth in *Montana*, so recently reaffirmed in *Strate*, governs the taxation of nonmembers on fee land.

II. UNDER THE RULE OF *MONTANA* AND *STRATE*, THE NAVAJO NATION CANNOT APPLY ITS HOTEL OCCUPANCY TAX TO NONMEMBER GUESTS ON FEE LAND

Under the general rule of *Montana*, a tribe cannot exercise jurisdiction over nonmembers on fee land, unless Congress has expressly authorized tribal jurisdiction or one of two exceptions is met. Here, there is no dispute that the hotel is located on fee land. *See* Pet. App. 56a. Nor is there any express congressional authorization for this tax. Thus, in order "[t]o prevail here," as in *Strate*, the Tribe "must show that [its tax] against nonmembers qualifies under one of *Montana*'s two exceptions." 520 U.S. at 456.

Neither exception is satisfied here, any more than in *Strate*. There, this Court held that a non-Indian involved in an accident while driving a truck over a state highway on the reservation was not subject to tribal court jurisdiction. Here, the hotel's non-Indian guests traveling on a federal highway do little more than spend the night at a hotel located on fee land. This form of conduct does not constitute either a consensual relationship with the Tribe or an intrusion on tribal self-government.

A. The Navajo Hotel Occupancy Tax Is Not Authorized by *Montana*'s "Consensual Relationships" Exception

The transaction assertedly subject to tax in this case does not fall under *Montana*'s first exception for consensual commercial relationships. "The first exception to the *Montana* rule covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Strate*, 520 U.S. at 456-57. Here, the district court found that Atkinson Trading's overnight guests had no such relationship with the Navajo Nation: "No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." Pet. App. 65a. That finding should have ended the matter.

The incidence of the HOT falls on Atkinson Trading's guests, who have no conceivable relationship to the Tribe or its members. A hotel guest's overnight stay at the Trading Post is thus akin to the automobile accident at issue in *Strate*. The Navajo Nation has no connection with the transaction in question. The hotel transaction "'ar[ises] between two non-Indians,'" and is thus "distinctly non-tribal in nature." 520 U.S. at 456-57. As in *Strate*, *Montana*'s first exception cannot apply.

Even if the tax were imposed on Atkinson Trading, the Trading Post itself does not have the kind of consensual relationship necessary to support tribal jurisdiction under *Montana* and *Strate*. Although it employs some tribal members,[22] sells a small portion of its goods to tribal

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[22] Of course, federal equal employment opportunity law would prohibit the Trading Post from refusing to hire a qualified applicant for employment because that applicant was a Navajo Indian. J.A. 31.

members, and in the past had purchased some arts and crafts from tribal members, none of these relationships has any connection to the tax at issue. *Strate* requires more than a finding that a nonmember has *some* relationship with the tribe. Rather, there must be a nexus between the tribe and the *transaction sought to be regulated.* That is, to be permissible, the tribal regulation at issue must "arise out of" the consensual relationship between a nonmember and the tribe. *See, e.g., County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (*en banc*).

The facts of *Strate* illustrate this point. There, the non-Indian defendant "was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes . . . ." 520 U.S. at 457. That consensual relationship was held insufficient to support the application of the first exception because "'the [T]ribes were strangers to the accident.'" *Id.* (alteration in original) (citation omitted). Thus, while a consensual relationship was present in *Strate*, the case "present[ed] no 'consensual relationship' *of the qualifying kind.*" *Id.* (emphasis added). Similarly here, the minor relationships between Atkinson Trading and individual tribal members have no connection to the transaction sought to be taxed—overnight stays by the hotel guests. Whatever limited contacts Atkinson Trading might have with the members of the Tribe, it is undisputed that the Navajo Nation is not a party to the hotel's renting of rooms to overnight guests. *Montana*'s consensual relationship exception is inapplicable.

Lacking any express agreement on which to base a finding of a qualifying consensual relationship, the Tenth Circuit instead held that transient nonmembers staying at the Trading Post had entered into a relationship of "implied consent" with the Navajo Nation. Pet. App. 29a. The panel majority reasoned: "[T]he consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging

within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax." Pet. App. 29a. It noted that "the Tribe provides [Appellant's] overnight guests with the 'benefits of a civilized society' while the guests are present, and the presence of guests creates a greater need, both actual and potential, for tribal services.'" *Id.* at 30a (citation omitted).

The concept of "benefits of a civilized society" has never served as a standard under *Montana*'s exception for consensual relationships. This language was offered in *Merrion* to explain why it was not unfair to tax nonmembers who entered into transactions *with the tribe* taking place on *tribal lands*. *See Merrion*, 455 U.S. at 133, 135-38. In that circumstance, the nonmember benefits both from the tribal role in the transaction and from the tribe's management of its own trust lands. Nowhere in *Merrion*, however, does the Court suggest that benefits provided by the tribe give rise to an implied consensual relationship irrespective of the situs of the nonmember conduct.[23]

In fact, this Court has on more than one occasion refused to adopt a theory of implied consent. For example, in *Duro*, this Court rejected the argument that a nonmember could be subjected to criminal jurisdiction if the nonmember had sufficient "contacts" with the tribe. The Court reasoned: "The contacts approach is little more than a variation of the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him. We have rejected this approach for non-Indians." 495 U.S. at 695.

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[23] Thus, one district court that frequently deals with Indian matters has observed: "The advantages of a civilized society theory is not a jurisdictional test, but is instead simply a recognition of the source of a tribe's power to tax once jurisdiction over a nonmember has been established." *In re Haines*, 245 B.R. 401, 406 (D. Mont. 2000).

Similarly, the Court has repeatedly declined to incorporate a "benefits" standard into *Montana*'s consensual relationships inquiry. In *Montana*, it would have been arguable that fee owners hunting and fishing on their own lands benefited from tribal government. However, the Court plainly rejected that approach. Thus, Justice White observed in *Brendale* that fee owners "do not have a 'consensual relationship' with the [tribe] simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided." 492 U.S. at 428.

Were the potential receipt of "benefits of a civilized society" sufficient to infer nonmember consent to tribal authority, *Strate* would have been the ideal case in which to apply this standard. Defendant A-1 Contractors was a construction company doing business with the tribes. 520 U.S. at 443. A-1 Contractors performed work on the land on which a tribal community building was being constructed. *A-1 Contractors v. Strate*, 76 F.3d 930, 932 (8th Cir. 1996). Defendant Stockert was the driver of a gravel truck involved in the accident. Each of the defendants arguably could have benefited from actual or potential tribal services, including emergency services. Indeed, *Strate* specifically commented on the possibility of tribal police patrolling the very state highway on which the accident occurred: "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway . . . ." 520 U.S. at 456 n.11.

Based on these facts, both the United States[24] and the tribal petitioners[25] argued in *Strate* that a consensual relationship could be based on the nonmembers' receipt or potential receipt of tribal services, such as police and emergency services. Nevertheless, the *Strate* Court did not consider the possibility of these tribal services—the very same services invoked by the Navajo Nation here—sufficient to give rise to a consensual relationship with the tribes. *See id.* at 456-57. *Strate* thus makes clear that *Merrion*'s "benefits" test has no role to play in the "consensual relationship" analysis.

What the Navajo Nation seeks in its proposed incorporation of *Merrion*'s "benefits" concept is an entirely new

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[24] The United States argued:

> A Tribe has plenary authority to regulate non-Indians who "avail themselves of the substantial privilege of carrying on business on the reservation"—who, like the Tribe's own members, "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of a tribal government."

Brief for the United States as Amicus Curiae Supporting Petitioners at 29 (Nov. 12, 1996), *Strate v. A-1 Contractors* (No. 95-1872).

[25] The tribal petitioners argued:

> With respect to "consensual relationships" with the Tribe, it is undisputed that respondents deliberately chose to contract with a tribal company to help develop a tribal community center on the reservation. During their extensive dealings on the Reservation, respondents benefited from "the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of a tribal government." Where an individual or company actively seeks out and benefits from tribal society, simple fairness suggests that it should be held accountable under generally applicable principles of tribal law.

Reply Brief of Petitioners at 13-14 (Dec. 27, 1996), *Strate v. A-1 Contractors* (No. 95-1872) (citation omitted) (footnote omitted), *available at* 1996 WL 739255, at **13-14.

Montana exception, which would allow tribal taxation of nonmembers as long as they are within the territorial confines of the reservation. If this Court had intended to establish such a third exception to *Montana*'s general rule, it seems logical that it would have done so when it established and applied its general framework in *Montana* and *Strate*. However, this Court has been careful not to adopt exceptions that "would severely shrink the rule." *Id.* at 458.

At the end of the day, the district court's factual finding that Atkinson Trading's guests have no express consensual arrangements with the Navajo Nation or its members controls the determination of *Montana*'s first exception. In *Montana* itself, the Court applied the first exception in this simple fashion: "Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." 450 U.S. at 566. Because the transaction at issue here takes place wholly between nonmembers, neither Atkinson Trading nor its guests have a qualifying consensual relationship. *Montana*'s first exception is not met in this case.

B. The Navajo Hotel Occupancy Tax Is Not Authorized by *Montana*'s Second Exception for Threats to Tribal Self-Government

Montana's second exception is also inapplicable here.[26] That exception allows a tribe to regulate nonmember conduct on fee lands "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the

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[26] Neither the court of appeals nor the district court analyzed tribal authority under *Montana*'s second exception. *See* Pet. App. 11a n.8; *id.* at 65a. However, the Navajo Supreme Court based its holding, in part, on its conclusion that *Montana*'s second exception was satisfied in this case, and the Navajo Nation has continued to rely on this exception throughout this litigation.

health or welfare of the tribe." *Montana*, 450 U.S. at 566. Here, the renting of rooms by nonmembers at the hotel has no effect on the tribal interest protected by this exception—the right to tribal self-government. *Strate*, 520 U.S. at 459.

This Court warned in *Strate* that *Montana*'s second exception is not a broad authorization of tribal jurisdiction: "Read in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459. Instead, the *Strate* Court reasoned that the proper focus of the second *Montana* exception is the preservation of tribal self-government. "Key to its proper application . . . is the Court's preface" in *Montana*:

> "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."

Strate, 520 U.S. at 459 (citations omitted) (alterations in original). Looking at the automobile accident at issue there, the *Strate* Court concluded that tribal jurisdiction was not "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (citation omitted). Thus, *Strate* limits the reach of *Montana*'s second exception to cases in which nonmember conduct "would trench unduly on tribal self-government." *Id.* at 458.

The nonmember conduct at issue here—overnight room rentals—has no effect on tribal self-government, let alone the "demonstrably serious" impact required in *Brendale*. *See* 492 U.S. at 431 (opinion of White, J.). A nonmember's overnight stay in a hotel on the reservation certainly has no more effect on tribal self-government than nonmember hunting on the reservation, as in *Montana*, or a nonmember in a gravel truck "driv[ing] carelessly on a public highway running through a

reservation," as in *Strate*. 520 U.S. at 459. A hotel room rental thus does not "trench unduly on tribal self-government." *Id.* at 458.

The Navajo Supreme Court concluded otherwise, however, reasoning that tribal taxation, "that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity." Pet. App. 88a. But that court surely missed the point of *Montana*'s second exception. *Montana* required that the nonmember conduct sought to be regulated—and not the tribal regulation sought to be imposed—must have an impact on tribal self-government before a tribe's authority may attach. *See Montana*, 450 U.S. at 566 ("when *that conduct* threatens or has some direct effect on" tribal self-government) (emphasis added). The Navajo Supreme Court's focus on the exercise of tribal self-government as a justification for the authority to exercise tribal jurisdiction over nonmembers is circular. A tribe could justify every exercise of its taxing power—no matter where exercised or on whom the tax falls—by simply arguing that the taxing power is essential to its existence as a government. *See* Pet. App. 50a (Briscoe, J., dissenting).

It is hard to see the taxation of outsiders as an exercise of tribal *self*-government. Tribes have plenary authority to tax their own members as an exercise of self-governance. *See Wheeler*, 435 U.S. at 322 (tribal "right of internal self-government includes the right to prescribe laws applicable to tribe members"). In fact, in many circumstances, federal case law precludes the states from taxing the economic activity of tribal members who remain on the reservation, precisely because that state taxation of tribal members would interfere with "internal governance and self-determination." *Duro*,

495 U.S. at 686.[27] Under these circumstances, where tribal self-determination exempts tribal members from burdens typically assumed by other citizens, it is particularly troubling for the tribes to rely on the same concept of self-determination to shift the burden of funding their own government to outsiders.

Indeed, permitting the taxation of nonmembers would create a strong temptation for a tribe to support its self-government largely on the shoulders of those who cannot participate in it. Those dynamics are illustrated by the consideration of the tax here. The Executive Director of the Navajo Tax Commission explained that, at the time of the adoption of the HOT, tribal members on the Reservation did not pay taxes: "[A] general consumer, you know, Joe Navajo and all that, they don't have to pay any taxes on the reservation." J.A. 144.[28] He further testified that his Commission had identified several means of raising additional revenues, including an income tax, a gasoline tax, and an expansion of the business activity tax. However, in the end, the Commission chose to avoid these taxes that would fall in part on tribal members, apparently because of the "resistance"

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[27] *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973) (invalidating Arizona state income tax as applied to reservation Indians with income derived wholly from reservation sources).

[28] The existing Navajo taxes fall primarily on businesses, many of which are non-Indian owned. *See* 24 Navajo Tribal Code §§ 201 *et seq.* (possessory interest tax imposed on leaseholds from the Navajo Nation with a value greater than $100,000); 24 Navajo Tribal Code §§ 301 *et seq.* (oil and gas severance tax); 24 Navajo Tribal Code §§ 401 *et seq.* (business activity tax where the deduction of the first $125,000 in gross receipts and the exclusion of Navajo Nation-owned businesses would exclude most, if not all, Navajo businesses). Thus, although the Navajo reservation Indian population exceeds 123,000, *see* U.S. Bureau of the Census, *American Indian and Alaska Native Areas: 1990*, at 40 (June 1991), only 740 taxpayers paid taxes to the Navajo Nation at the time of adoption of the HOT. J.A. 161.

that they would face. J.A. 142-43. Instead, the Tax Commission recommended the HOT as another tax that would fall primarily, if not entirely, on nonmembers. *See* J.A. 145. Indeed, the tribal resolution adopting the HOT states that the tax was designed to have "minimal impacts" on Navajo businesses and Navajo individuals. J.A. 16.

This case thus illustrates the pressures that will inevitably build when a closed society considers raising revenues through the taxation of outsiders. The principle of *Colville* and *Merrion* addresses that problem by permitting taxation when a nonmember enters tribal lands to do business with the tribe. However, a transaction occurring wholly between nonmembers on fee land does not meet the criteria of those decisions. The "self government" exception to *Montana*'s main rule was not designed to permit the shifting of the burdens of government to nonmembers in these circumstances.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit and hold that the Navajo Nation may not apply its hotel occupancy tax to a transaction between nonmembers on fee land.

Respectfully submitted,

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